

ito Vs. Hiralal Bhat

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Court : Rajasthan

Decided On : Jan-23-2001

Reported in : (2001)72TTJ(NULL)163

Appeal No. : ITA No. 815/Jp/1997 23 January 2001 A.Y. 1994-95

Appellant : ito

Respondent : Hiralal Bhat

Advocate for Pet/Ap. : R.N. Jangid, *for the Revenue* Suresh Ojha, *for the Assessee*

Judgement :

ORDER

S.R. Chauhan, J.M.

This appeal by revenue for assessment year 1994-95 is directed against the order of Commissioner (Appeals), Jodhpur, date 11-3-1997.

2. We have heard the arguments of both the sides and also perused the records.
3. The revenue originally raised only one ground of appeal before Tribunal disputing the allowing of deduction by way of depreciation after applying net rate of profit. But the learned Departmental Representative has filed a petition for admitting an additional ground as ground No. 2 disputing the first appellate

authority's action in not enhancing the net profit rate applied by assessing officer when the said authority had made up mind for separately allowing depreciation.

4. We first deal with the preliminary objection orally raised by learned authorised representative of assessee during arguments to the maintainability of this appeal. He has contended that the first appellate authority has not allowed depreciation but has simply directed that the assessing officer 'may' allow the same. He has contended that in the circumstances the assessing officer cannot have any grievance against the impugned order of Commissioner (Appeals) He has cited CIT v. Princess Sarla Kumari : [1988]171ITR14(MP) . He has also contended that against the impugned order of Commissioner (Appeals) both the Department as also assessee preferred appeals and while this appeal of revenue is pending, the assessee's appeal stands already decided by Jaipur Tribunal vide their common order date. 20-3-1998, wherein the Tribunal has held the depreciation to be an allowable deduction and deleted the addition sustained by Commissioner (Appeals) vide para 6 on p. 3 of the order (p. 5 of paper-book). He has contended that the department's R.A. under section 256(2) has also been rejected by High Court and no question of depreciation was raised therein which shows that the department has conceded in this point. He has cited 99 STC 3 (SC). As against this the learned Departmental Representative of Revenue has contended that the assessing officer had applied n.p. rate after considering depreciation and so no further depreciation was allowable and the department is very much aggrieved against the impugned order of learned Commissioner (Appeals) in directing assessing officer that he may allow depreciation after obtaining evidence regarding owning and user of the vehicles, etc.

5. We have considered the rival contentions, the relevant material on record as also the cited decisions. In : [1988]171ITR14(MP) (supra) the facts were that notice under section 143(2) was issued by Income Tax Officer on 27-2-1976, and consequent thereto the assessee gave appearance on 5-3-1976, and on being asked by Income Tax Officer the assessee furnished certain information on 11-3-1976. Thereafter assessment order was passed which was inadvertently dated as 27-2-1976. The assessee preferred appeal before AAC who allowed the appeal in its entirety. The assessee then preferred second appeal before Tribunal raising

two grounds and the relevant ground No. (i) was 'that the assessment is back-dated, being illegal and bad in law.' The Tribunal instead of confining itself to this ground, rather went ahead and held that 'the order of assessment had been passed before issue of notice under section 143 and hearing the assessee', and this was never the plea of assessee before Tribunal. The second appeal filed by assessee before Tribunal was not maintainable for the reason that AAC had allowed assessee's appeal in its entirety and so the assessee could not be said to be 'aggrieved' by the order of AAC within section 253. It was in these circumstances that the Hon'ble M.P. High Court held that the Tribunal overstepped its jurisdiction under section 254(1) in entertaining the appeal. Obvious as it is, the facts of the cited case are clearly distinguishable. In the instant case the revenue's case was that no depreciation was allowable to assessee as the depreciation had already been considered by assessing officer while applying net profit rate whereas the learned Commissioner (Appeals) directed that the assessing officer may allow depreciation after obtaining evidence of ownership and user of the vehicles, etc. Thus the learned Commissioner (Appeals) opened the scope of allowing depreciation and the assessing officer could allow the same after obtaining the requisite evidence, Obviously the revenue could not be said to have no grievance at all and thereby to render the appeal not maintainable. The contention of the learned authorised representative of assessee is thus found to be devoid of merit and the objection is rejected.

6. Now we proceed to decide the appeal on merit. Considering the rival contentions as also the facts and circumstances of the case we find the matter of revenue's petition filed on 6-11-2000, seeking permission to raise additional ground is covered by the order dt. 21-12-2000, of this Bench passed in common in ITA Nos. 1864/Jp/94 and 508/Jp/96 for assessment years 1991-92 and 1993-94 in the case of Asstt. CIT v. Ansari Builders (2001) 21 DTC 248 (Jod) : (2001) 70 TTJ (Jod) 664 wherein this Tribunal has held in para 11 of its order that raising of a new additional ground regarding enhancing net profit rate which was not agitated in the original grounds taken by revenue in revenue's appeal would tantamount to filing of a fresh appeal on that count and the same cannot be allowed to be taken if the appeal becomes time-barred under section 253(3) of Income Tax Act. The Tribunal therein followed Indian Steel & Wire Products Ltd. vs. CIT :

[1994]208ITR740(Cal) . In the instant case we find that the order appealed against was communicated on 26-3-1997, as mentioned against serial No. 9 of memo of appeal, and so the period of 60 days as provided under section 253(3) from 26-3-1997, has expired years before the filing of revenue's petition for raising of the additional ground, on 6-11-2000. As such as the appeal on this count becomes time-barred the additional ground being sought to be raised by the revenue vide their petition submitted before the Tribunal on 6-11-2000, cannot be allowed for there being no cause nor a fresh cause for the said delay having been shown, nor even a petition for condonation of the intervening delay having been filed, for considering the same under s 253(5). Similarly, the situation of opponent's right to file cross objection under section 253(4) within 30 days of the receipt of notice of the filing of appeal also gets jeopardised as has been held by this Tribunal in the aforesaid order. Accordingly, respectfully following the aforesaid order of this Tribunal we reject the department's petition for raising of the new additional ground filed before us on 6-11-2000.

7. As regards the original ground of appeal the same disputes the learned Commissioner (Appeals) direction of assessing officer to allow depreciation after applying net rate of profit. This issue is covered by the decision of Hon'ble Rajasthan High Court in the case of CIT v. Jain Construction Co. & Ors. . Accordingly, in view of the said decision we find no mistake in the learned Commissioner (Appeals) impugned order on this count.

8. In the result, this appeal of revenue is dismissed.